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Discretionary power in the domain of youth care

A juridical and policy analysis on the new Dutch act on youth care

1. Introduction

1st January 2015 the Dutch State decentralised various tasks in the social policy domain to local authorities. One of these policy areas is youth care. Critiques had questioned the effectiveness and the efficiency of the former system, which was plagued by fragmentation. In that system the central state, provinces and local authorities were responsible for different parts of the policy. Now most responsibilities have been shifted to the local authorities, whereby the local authorities are the implementation agencies with discretionary powers, while the central state carries the final responsibility for youth policy. This is said to result in better care. By adopting the prescribed ‘one family, one plan, one director’ procedure, local authorities are expected to develop a ‘tailor made’ approach which includes all necessary partners when helping young people and their families.

This paper focusses on the expected effects of the discretionary powers. We explore the potential bottlenecks and discuss the expected effects of discretionary powers from a juridical perspective and from a public administration perspective. Within the (policy) implementation literature, the idea of discretionary power is a central subject. It is argued that in a world with increasingly complex problems, you cannot foresee all the variations in policy fields. It is therefore inevitable to give discretionary powers to implementers in order to obtain favourable results. However, how does the state ensure it still reaches stated goals when the local authorities have been given discretionary powers? Also from a public law perspective, the need for and the dangers of discretionary powers is acknowledged. How does this ‘tailor made’ approach relate to the Dutch rule of purpose-specific powers? This fundamental principle of administrative law requires of the legislator that it sufficiently specifies the authority conferred on the administration by providing substantive norms. Does this new Act on youth care lead to adverse effects on the safeguarding functions of the rule of purpose-specific powers? How does this compare to the goal of more effective and more efficient policy in the field of youth care?

We start with a short introduction into the new Act on youth care by discussing the reasons for decentralisation of youth care (section 2). We then explain what discretionary powers are and how they are introduced in this act (section 3). The consequences of discretionary powers in the act are first analysed from a juridical perspective (section 4), and then analysed by using public administration literature (section 5). In the conclusion we combine the results, in order to give some provisional ideas on whether the assumed outcomes in the field of youth care, in the light of the discretionary powers, are likely to be reached (section 6).

2. The new Dutch Act on Youth Care

The new Youth Care Act 2015 replaces the Youth Care Act of 2005. This legislative operation entails a complete overhaul of the youth care system in the Netherlands. This raises the question why such a drastic transformation is needed. We start by describing the previous Act on youth care and its believed shortcomings, then continuing with the assumed outcomes of the new Act.

2.1 Youth Care Act 2005 and believed shortcomings

In the previous Dutch system of youth care different layers of Dutch government were responsible for the different types of youth care. The Ministry of Health, Welfare and Sport was responsible for the overall youth policy and specialized services. Juvenile justice and related institutions were covered by the Ministry of Security and Justice. The 12 provinces and 3 large urban areas were also charged with tasks of specialized services for youth and families (provincial youth care services). The municipalities were responsible for universal services (such as child care and regular schools) and preventive services (for example Health visitors, general social work and Youth and Family Centres).

The Youth Care Act 2005 regulated the right to, access to and the funding of youth care. All 12 provinces and 3 large urban areas had so-called Youth Care Agencies.¹ These Youth Care Agencies had the task to assess the needs and the situation of children and families with serious development and/or parenting problems and refer them to specialized services if needed (for example youth mental health care services and child protection services).² Citizens could also file an application at the Youth Care Agencies in order to get youth care. These agencies would assess whether or not care was needed, and if so, what kind of care should be offered. The results of this assessment were laid down in a so-called “indication decision”. Once such a decision was taken, a legal claim on youth care existed.³ It is worth mentioning that these Youth Care Agencies did not provide youth care but had to refer the client to youth care providers.⁴

¹ Art. 4 Youth Care Act 2005.

² Art. 5 Youth Care Act 2005.

³ Art. 3(3) Youth Care Act 2005.

⁴ Art. 10 (1f) Youth Care Act 2005.

According to the Dutch Government, the youth care system under the Youth Care Act of 2005 faced a number of - intertwined - problems that needed solving.⁵ One of the problems that existed, was that there was a strong tendency towards specialized care. This tendency not only lead to long waiting lists and a surplus of bureaucracy, but it also raised the question whether all the children referred actually needed this specialised care. The Dutch government was of the opinion that a transformation was needed towards preventive care and more emphasis should be put on the own responsibility of the child and his or her social environment.

Another serious problem that needed solving, partly induced by the fact that there is a strong tendency towards specialized care, was the observed lack of cooperation between services and organisations in the field of youth care. Children were often referred to more than one organisation or service. Although they all treat the child, there is a serious lack of cooperation between these organisations. This partly stems from the simple fact that they are different organisations. But this is not the whole story. Different types of care are each financed in their own way. This leads not only to bureaucracy but also to a lot of extra work if the type of care a child needs is not offered by one service. In those situations, it is easier to refer a child to another service than to, together with other services, offer the care a child actually needs. Besides that, all these services have their own admission procedures. In some cases, these procedures take more time and cost more than the actual treatment. It also lead to long waiting lists and bureaucracy.

A third problem detected by the Dutch government, was the increased use of care and medication in youth care. Deviant behaviour of a child easily leads to a referral to specialised services in the current system. Besides that, this type of behaviour is often treated with medication. The government is of the opinion that is not necessary in all the cases and that under the new Youth Care Act deviant behaviour should not always lead to medication and referral to specialised services.⁶ Last, but certainly not least, all these tendencies in the field of youth care - fragmentation, a tendency towards specialised care and medicalization and the referring of clients rather than offering the care children actually need - amount to the serious raise of the costs.

2.2 Youth Care Act 2015 and assumed outcomes

In the new Youth Care Act youth care is decentralized to municipalities. The new system of youth care contains one legal framework and one integrated funding system. Defragmentation of financial flows should offer municipalities more opportunities to integrated care and therefore more effective help to young people and their families.⁷ In order to achieve this transformation all the administrative and financial responsibilities are shifted from the national and regional authorities to the municipalities. The local authorities will gain responsibility for most of the youth care, including health visitors, the prevention of child abuse, the care of children with a mental illness, youth probation and the care of children with special needs.

⁵ Parliamentary Papers 2012/13, 33 684, No. 3, p. 2, p. 11-14.

⁶ Parliamentary Papers 2012/13, 33 684, No. 3, p. 14.

⁷ Parliamentary Papers 2012/13, 33 648, No. 3, p. 3.

So, what does the government expect from this major transformation? Main goal of this transformation is to change the system into a more efficient, effective and less complex system. The ultimate goal is to activate and strengthen the capacities of the children and the enlarge the problem solving capacities of their families and social environment.⁸ The government is of the opinion there should be a transition towards:

- a. more emphasis on prevention and the capacities and responsibility of the child, his parents and his social environment.
- b. the improvement of parenting skills of parents, the strengthening the professional practice of practitioners in nurseries and preschools and of teachers at schools.
- c. offering more suitable care at an earlier stage to prevent the referring of children to more expensive care
- d. more cooperation between the different services and organisations involved in youth care in order to realise the principle of ‘one family, one plan, one director’.
- e. more leeway for professionals to actually provide the right type of care by decreasing the amount of bureaucracy.

The Dutch government puts much emphasis on the principle of ‘one family, one plan, one director’ in order to put an end to the fragmentation of care. Starting point of this principle is that children and their parents are responsible. This also means they are responsible for coordinating their own care.⁹ It is clear not all families have the abilities to actually do so. When multiple practitioners and services are involved in one family or child and the parents themselves are not able to coordinate the care, one practitioner will be appointed director. Working according this principle also means that care offered to a child or a family should focus on the existing capacities of family members and their social environment and the strengthening of these capacities in order to solve problems.¹⁰

In order to realise this transition in youth care, the financial and administrative responsibility for most forms of youth care is shifted from national and regional authorities towards the local authorities. The government is of the opinion that this decentralisation operation will create the necessary financial and administrative conditions for a successful transition.¹¹ In this way, by making only the local government responsible for policy decisions in youth care, services should provide better care and financial incentives to refer clients to another service should be reduced since it is the local government is controlling all the finances in the field of youth care. The local government is also made responsible to make sure the transition goals are actually met.¹²

⁸ Parliamentary Papers 2012/13, 33 684, No. 3, p. 2, 19-20.

⁹ Parliamentary Papers 2012/13, 33 684, No. 3, p. 20.

¹⁰ Parliamentary Papers 2012/13, 33 684, No. 3, p. 20.

¹¹ Parliamentary Papers 2012/13, 33 684, No. 3 p. 2-3.

¹² Parliamentary Papers 2012/13, 33 684, No. 3, p. 3.

3. Discretionary powers in Youth Care Act 2015

In this section we explain shortly what discretionary powers are and how they are introduced in the new act on youth care. We also discuss relevant first case law.

3.1 Discretionary powers

Within the new Youth Care Act, municipalities are granted discretionary powers. From a public law perspective discretionary power can be recognized in the amount of freedom the administrative authority has to decide. Acts and decisions of administrative authorities are bound by the rule of law. The legislator specifies the authority conferred on the administration by providing substantive norms. But too much specification of authority can lead to fragmentation. Fragmented administration causes problems in several fields of administrative law, such as environmental law and social security law. It is clear that fragmented administration hinders a ‘tailor-made approach’. Therefore, in cases a tailor-made approach is needed, administrative authorities should get more leeway to decide case by case. However, more discretionary power could lead to arbitrary decisions, less legal certainty and reduced judicial control.

The public administration literature takes the same perspective on discretionary powers as public law: discretionary power can be recognized in the amount of freedom the administrative authority has to decide. There is a need for freedom, since it is difficult to develop precise rules that will lead to efficient and effective results. Precise rules have many advantages. The more precise the rules are describes, the more alike cases will be treated, the less likely the process will be influenced by personal predilections of officials and the more predictable the outcome. However, the more precise, the less it is receptive for personal or contextual circumstances. Since conditions and circumstances do change and differ from place to place, it is understandable rules are less precise. This enables flexible application of the rules to new, unique or changing circumstances.¹³

3.2 Youth Care Act 2015

Within the new Youth Care Act, the discretionary powers of the municipalities can be found in chapter 2. This chapter is titled “municipalities” and creates legal instruments for the municipalities in the field of youth care. Municipalities have a duty to provide youth care. This means that the administrative authority has the obligation to provide services of youth care to youth and their families who need those services. The Youth Care Act does not prescribe the services the local authority has to offer to the youth and their families but determines the result that should be achieved.

¹³ Stone, D., 2012, Policy paradox: the art of political decision making, 3rd ed., W.W. Norton & Company.

Article 2.3 (1) states that if a juvenile or parent needs youth care in the opinion of the administrative authority (college van B&W) associated with developmental and behavioural problems, mental health problems and disorders and to the extent that own abilities and problem solving skills are inadequate, the administrative authority will benefit from the juvenile who resides within his congregation, facilities in the field of youth and guarantees expert guidance to, advising on, determining and deploying the designated facility whereby the youthful is enabled: a healthy and safe to grow on; to grow into independence, and enough to be self-reliant and social participation, taking into account his age and development level.

From the clause “in the opinion of” in art. 2.3 follows that the administrative authority has discretionary powers in deciding whether or not a service of youth care is necessary and what kind of service of youth care is suited in a specific case.¹⁴ They are advised by an expert who assesses if a juvenile or a parent is in need of youth care and what kind of help is needed. However, in the parliamentary papers it is emphasized that the administrative authority have to make its own independent judgement and should decide which service is sufficient in a specific case. According to the parliamentary papers financial considerations should play no role in this assessment. In an individual case, the adequacy of the municipal budget should not be a consideration for denying an individual facility¹⁵

Municipalities are responsible to draft a policy plan. They also have to set up regulation for the execution of these tasks.¹⁶ And although municipalities have discretionary power to shape their policy, the Youth Care Act 2015 gives some direction. For example, from article 2.1(f) it follows that the municipal policy plan should focus on integrated help to young people and their families in case of multiple social problems (for example behavioural problems, financial problems, housing problems). The administrative authority is responsible to ensure that there is sufficient care available and that it fulfils certain quality standards.¹⁷

3.3 Case law

In the first months after the enactment of the Youth Care Act 2015 the new task of the municipalities, more specific ‘the duty to youth care’, has led to some interesting case law.

The administrative court of Limburg ruled twice whether the decision of the administrative authority to provide an individual service of youth care was in line with article 2.3 of the Youth Care Act 2015. The first case considers a request of the Council of Child Protection to place a minor in a foster care facility for a period of six months.¹⁸ From article 1:126b(2) of the Dutch Civil Code follows that the administrative court has the authority to decide on such an out of home placement request. Main rule is that a decision of the administrative authority

¹⁴ Parliamentary Papers 2012/13, 33 648, No. 3, p. 136.

¹⁵ Parliamentary Papers 2012/13, 33 648, No. 3, p. 135.

¹⁶ Art. 2.2 and 2.9 Youth Care Act 2015.

¹⁷ Art. 2.6 (1a) Youth Care Act 2015.

¹⁸ Court of Limburg 30 March 2015, ECLI:NL:RBLIM:2015:3539.

referred to in article 2.3 of the Youth Care Act is necessary. In this case the administrative authority decided in advance and without any reservation to conform to the results of the investigations of the Council of Child Protection and mentions that a request of out home placement could be a possible outcome. The court of Limburg ruled that by doing so the administrative authority escapes the legal obligation to decide what kind of service of youth care is suited in this specific case. Article 2.11 of the Youth Care Act states that tasks of the local authorities can be performed by third parties, however the establishments of rights and obligations (art. 2.3) is excluded. The court emphasised that given the tasks and responsibilities given by the legislator the administrative authority cannot simply follow the results of the research of the Council of Child Protection. The second case also concerns a request of the Council of Child Protection of out of home placement of a juvenile and with regard to article 2.3 the courts reaches the same conclusion.¹⁹

Furthermore there is some case law on the question whether the authority to decide on the duty of youth care can be mandated by the local authority to other parties. ‘Mandate’ is defined in article 10:1 of the Dutch General Administrative Law Act (GALA) as the power to take decisions in the name of an administrative authority. A feature of this construction of mandate is that the decision taken by a mandatar within the scope of his power is deemed to be a decision of the mandator. Article 10:3(1) of the GALA states that ‘An administrative authority may grant a mandate unless otherwise provided by law or unless the nature of the power is incompatible with the mandate’. The Court of Gelderland ruled in two cases that local authorities are not allowed to mandate their task to make a decision whether or not a service of youth care is necessary and what kind of service of youth care is suited in a specific case (art. 2.3).²⁰ In both cases the local authorities mandated this task to the certified institution Child Protection Gelderland. In the rulings the court refers to the parliamentary papers of the Youth Care Act 2015 and highlights the new tasks and responsibilities of the local authority to decide on this ‘duty of youth care’. The nature of the power is incompatible with the mandate. However, the Court of Rotterdam allowed the construction of mandate of the power of article 2.3 in two other cases. In one case the power was mandated to the Service organization Youth Zuid-Holland²¹ and in the other to the Concern director social development (civil servant of the local authority).²² According to the court of Rotterdam the construction of mandate does not conflict with the Youth Act 2015 and the underlying parliamentary papers. A difference with the cases of the Court of Gelderland is that in Rotterdam the power was not mandated to an institution that also offers youth care itself.

4. Need for and danger of discretionary powers: legal perspective

Fragmented administration hinders a ‘tailor-made approach’; therefore administrative authorities are given more leeway to decide case by case in the Youth Act 2015. Here we will discuss the danger of discretionary powers from a legal perspective. First, we shortly discuss the rela-

¹⁹ Court of Limburg 10 April 2015, ECLI:NL:RBLIM:2015:3539.

²⁰ Court Gelderland 2 February 2015, ECLI:NL:RBGEL:2015:1016; Court Gelderland 2 February 2015, ECLI:NL:RBGEL:2015:1159.

²¹ Court Rotterdam 28 April 2015, ECLI:NL:RBROT:2015:3412.

²² Court Rotterdam 7 May 2015, ECLI:NL:RBROT:2015:3241.

tion between discretionary powers and the principle of Dutch administrative law that requires of the legislator that it sufficiently specifies the authority conferred on the administration by providing substantive norms. After that we explore the expected effects of the discretionary powers that come with the decentralisation of youth care and focus on potential bottlenecks.

4.1 Rule of purpose-specific powers

In the Netherlands citizens are confronted with divided and compartmentalized administration. This problem of compartmentalized administration occurs in several fields of administrative law such as environmental law and social welfare. In some instances several permits are required for one single activity (several proceedings, different sets of rules to follow and some-times even several competent authorities). Integration of legislation and more discretion for public authorities to decide on a case by case basis is a growing trend to solve this problem.

The question is how these solutions of the legislator to the problem of fragmented administration relate to the Dutch rule of purpose-specific powers (*'specialiteitsbeginsel'*). In the Netherlands, in exercising its powers an administrative authority is governed by the principle of legality and the rule of purpose-specific powers.²³ The principle of legality means that action taken by an administrative authority requires a legal basis. The rule of purpose-specific powers requires the legislator to sufficiently specify the authority conferred on the administration by providing substantive norms. This fundamental principle of Dutch administrative law also implies that a rule of administrative law may only be applied within its own well-defined scope and, as a result, may not be used to achieve objectives outside of that scope. The underlying reason for the idea that government action must be based on law is to protect citizens against the abuse of power and unauthorized government action. In exercising a specific power, the administrative authority can only act in those interests specified by the legislation.

Negative effects of the rule of purpose-specific powers (fragmented administration) seem to be colliding with the principle of efficiency and effectiveness. However, providing more discretionary power could lead to arbitrary decisions, less legal certainty and reduced judicial control. A difficult question to answer is whether more discretionary powers provided by the legislator leads to irresponsible effects on the safeguarding functions of the rule of purpose-specific powers. In general it can be stated that adverse effects on the rule of purpose-specific powers can be justified when this leads to a better balance with the principles of efficiency and effectiveness.²⁴

4.2 Youth Care Act 2015

The Youth Care Act 2015 grants municipalities more discretionary powers. But to what extent did the legislator take into account the possible adverse effects on the safeguarding function of the rule of purpose-specific powers? What are potential bottlenecks?

²³ Damen, 2013, p. 53.

²⁴ This assessment framework has been worked out more in detail. See Tolsma, 2014, p. 89-91.

Firstly, article 2.9 of the Youth Care Act 2015 commands the municipality to establish rules on provided services by the administrative authority. More specific rules need to be established on the conditions for granting these services, the method of assessment and weighting factors. According to the legislator this should provide citizens with legal certainty.²⁵ Furthermore the legislator recommends municipalities to coordinate as far as possible the offer of youth care and to provide uniform services of youth care. Offering equal care in similar cases contributes to legal certainty of citizens and prevents arbitrary decisions. So, in the legislative process the adverse effects on legal certainty and potential arbitrary decision-making received attention. What is remarkable though is that the legislator explicitly added the clause “in the opinion of” in art. 2.3 of the Youth Care Act. According to Dutch theory of administrative law this means that the court in testing the decision should respect the assessment of the local authority. The court should act ‘as a referee’ and should only scrutinize the decision if it comes to the conclusion that local authority exceeded the margin of reasonableness. However, the question is how the court will deal with these cases. An indication might be a similar provision in the Dutch Social Support Act (Wmo), which is tested more intensively by the court. We expect that the same will happen once art. 2.3 of the Youth Care Act will be brought before Court. This means that it remains to be seen to what extent local authorities will actually have discretionary power exercising their duty of youth care.

Next question that needs answering is whether the solution to the problem of fragmented administration (more discretion for public authorities to decide on a case by case) lead to a better balance with principles of efficiency and effectiveness. In the new system of youth care local authorities are responsible for the control of the prescribed ‘one family, one plan, one director’ procedure. Local authorities have to develop a tailor-made approach. The Youth Act 2015 gives municipalities a great amount of freedom in the way they wish to organise this new tailor-made procedure. An important condition to fulfil these new tasks is that municipalities have sufficient expertise. The new Act allows the use of expertise of third parties, however the duty of youth care of art. 2.3 forms an exception.²⁶ In our view the presence of sufficient expertise at the municipalities is one of the main potential bottlenecks in the new system. According to the legislator the presence of this expertise is guaranteed by the obligation to set up rules in implementing legislation (art. 2.14 Youth Care Act 2015). Article 2.1 of this governmental decree (*Besluit Jeugdwet*) states that the administrative authority will ensure the availability of relevant expertise regarding: a. developmental and behavioural problems, mental health problems and disorders, b. parenting situations that young people may be threatened in their development, c. language and learning disabilities, d. somatic disorders, e. physical or mental disabilities, and f. child abuse and domestic violence. If we take a look at first case law discussed before, signs are that local authorities in practice seem to struggle with their new ‘duty of youth care’ and the organisation of this tailor-made approach.

Obviously further empirical research is necessary to answer the question if local authorities are capable to deal with their new discretionary power. An issue for further research is also

²⁵ Parliamentary papers 2012/13, 33 684, No. 3, p. 151-152.

²⁶ Art. 2.11 Youth Care Act 2015.

whether the new control task of municipalities will solve the problems of fragmentation. With the new Youth Act 2015 the legislator creates a clear front office for citizens: municipalities. However, in the new system problems of cooperation between the different services and organisations involved in youth care might as well shift to the back office.

5. Consequences of discretionary powers: public administration literature

Earlier we have discussed the advantages of discretionary powers, mentioned in the public administration literature. However, also within this branch of literature, some disadvantages are identified. Instead of focussing on the authorities, as done in the previous section, this branch of literature describes the effect on (mostly) individual decision makers.

As discussed, vague rules are more receptive to personal or contextual circumstances. It enables flexible application of the rules to new, unique or changing circumstances. In order to apply vague rules, decision makers need to use tacit knowledge, ‘the things people know but can’t put into words’.²⁷ However, since this tacit knowledge is not ‘put into words’ there can be suspicion of fraud when this knowledge is needed to make decisions. Besides other negative impacts of fraud, it can also be an indication policy objectives will not be reached. As a consequence, we see that when there are reasons to suspect fraud, more is done to make decision makers accountable for results or processes, to ensure the desired results will be reached.

Accountability is an instrument that can help to make the subordinate act in accordance to the wishes of the superior. This form of control can therefore be used to control governments and government officials. The term accountability seems quite straightforward, but Mulgan (2000) shows that, just like other concepts discussed within the public administration literature, the term is a ‘chameleon-like term’.²⁸ The essence is clear: it supposes a process in which one party is asked to account to another party for its actions. The latter party has ‘rights of superior authority over those who are accountable, including the rights to demand answers and to impose sanctions’.²⁹ This means that the superiors have a say in the decisions taken by the subordinates, and that the subordinates are obliged to take the preferences of the superiors into account. The subordinates give account of their actions and the superiors evaluate the results and sanction if necessary.³⁰

We can find these relations between citizens and holders of public office or the civil servants and between elected politicians and civil servants. The first can be labelled political or participative accountability, the latter administrative accountability.³¹ Essential, according to Mulgan, is that there is an interaction between these two parties. It ensures external scruti-

²⁷ Stone, 2012, p. 295.

²⁸ Mulgan, R., 2000, ‘“Accountability”: an ever-expanding concept?’, *Public administration*, vol. 78, no.3, p. 555.

²⁹ Mulgan, 2000, p. 555.

³⁰ Polverani, L., 2015, ‘Does devolution increase accountability? Empirical evidence from the implementation of European Union Cohesion Policy’, *Regional Studies*, vol. 49, no. 6, pp. 1077.

³¹ Polverani, 2015, 1078.

ny. It does not include the inner responsibility to if an individual to report about his or her actions, based on moral values.³²

The previous categorization means control and accountability can be found on different levels: higher governmental levels can monitor processes and outcomes of lower governments, we find arrangements in which similar governmental levels monitor each other (intergovernmental control mechanisms), but also citizens can monitor the outcomes, making authorities accountable for their actions.

In this paper, we only focus on the hierarchical control mechanisms. We are interested in control over the implementation process from the perspective of the central state. How do you assure that policy plans are implemented according to the original wishes? Within this case, the local authority can be seen as the implementation agency with discretionary powers, whereby the central state will carry the final responsibility. The central government, or more precise, the cabinet, is responsible for the supervision of the Youth Care Act. The cabinet needs to be able to determine whether the changes will lead to the assumed objectives at national level. Not only that, the cabinet is also accountable to the parliament. A report from the Dutch Court of Audit from May 2015³³ shows that the monitoring and the accountability structures still needed to be further developed at the end of 2014, even though the Act was implemented January 2015.

Accountability can be found on different governmental levels, and both horizontal and vertical. Accountability can further be described by distinguishing it from other forms of control. For example, laws and regulations are used to control the behaviour of public servants, but does not hold them accountable. They will be held accountable, once the superior asks the subordinate to account for something. This means administrative accountability takes mostly place during policy implementation and evaluation.

According to Hughes, accountability for performance, instead of for fairness or finances, is still controversial, even though it is the essence of accountability: giving insight in what governments produce and how well they do so.³⁴ The reason might be the difficulty to measure output and efficiency of the production in the public sector.³⁵ Therefore, '(m) easurement and evaluation are possible in the public sector, but they may be less precise and perhaps less meaningful'.³⁶ However, assuming rational behaviour, some kind of scrutiny is necessary, to avoid officials trying to maximize their own utility, instead of working towards meeting the formal goals.

Besides this difficulty, accountability structures are influenced by the type of rules that are set. Romzek argues that when formal, precise rules are replaced by discretion, a need for other means of accountability arises.³⁷ Where previously more close supervision was possible or needed, it is now expected that the accountable official anticipates expectations. A mix of these strategies would be preferred. Day and Klein have found that in a complex society, ac-

³² Mulgan, 2000, p. 557-558, 570-572.

³³ Court of Audit, 20 mei 2015, Rijksbrede resultaten en thema's verantwoordingsonderzoek 2014.

³⁴ Hughes, O. E., 2012, Public management and administration: an introduction, 4th ed., Palgrave, p. 192.

³⁵ Hughes, 2012, p.8.

³⁶ Hughes, 2012, p. 8.

³⁷ Romzek, 2000, in Hughes, 2012, p. 193.

countability can only take place when various techniques are used, focussing on the performance of the executives of the public policy. This would increase the effectiveness of the controlling mechanisms.³⁸

In conclusion, it can be argued that in a world with increasingly complex problems, you cannot foresee all the variations in policy fields. It is therefore inevitable to give discretionary powers to implementers in order to obtain favourable results. To assure policy processes function as planned, trust between the various actors is needed, implying a close relation between the controller and the controlled. This implies that the type of supervision cannot be focussed on output control, but it will need to rely on the input or throughput assessment of the policy. However, when this trust does not exist, a greater need for safeguards is created, such as a more dominant supervising role, and thereby increasing the administrative burden. This creates a tension between efficiency and effectiveness.

In either case, that of trust, and that of lack of trust, in order to have an efficient and effective supervision, we expect a clearly defined relation between the controller and controlled. When there is a relationship based on trust, we can assume this is based on a long term relation between the controlled and the controller. In cases this relationship does not exist, we expect clear rules on the exchange of information in order to create this more dominant supervising role. This also means the indicators which are used to exchange this information are known.

In the case of the act on youth care, it is, however, not clear, who monitors the progress of the national objectives. The act describes the state is responsible for the system, and therefore supervises the Act on Youth Care. However, the Court of Audit wrote in their accountability study over 2014, in May 2015, that the supervision role has not been developed, even though the cabinet will have to be able to determine whether the national objectives will be met.³⁹

As said, there are other ways to make the various actors accountable. Citizens can complain at their local authorities and they can go to court. However, this will still not make it clear whether the goals are met.

6. Concluding remarks

The new Youth Care Act 2015 is presented by the legislator as the solution to problems in the Dutch system of youth care. With the introduction of the Act tasks were decentralized to local authorities, who were granted some discretionary powers that would help them to provide youth care.

We have described the duty of care by the local authorities. Even though it seems these authorities have been granted discretionary powers, this paper has shown it is not very clear how far these powers reach. After authorities have asked for professional advice, they can make their own decision. They are not allowed to let these advisory institutions make the decisions

³⁸ Day and Klein, 1987 in: Parsons, W., 1995, Public policy: an introduction to the theory and practice of policy analysis, Edward Elgar, p. 539.

³⁹ Court of Audit, verantwoordingsonderzoek 2014, May 2015

for them. In their decision making the authorities are limited in the criteria they can weigh in their decision, since they cannot take into account financial considerations. Also, it is likely that in court the judges go further than only a marginal assessment of the decision.

Interesting here is that the decision needs to be made by the local authority. It is to be expected that most local authorities will, at least at first, not have the expertise to make the decisions. As stated, it needs to inform itself using the expertise of advisory institutions. We expect that because of the lack of expertise and the restrictions listed above, local authorities will follow these expert advices. It is questionable if we have sufficient insight in the way these institutions make their decisions. Local authorities will be accountable for the final decisions, but are they able to assess the quality of the decision making of these advisory institutions? For example, do financial considerations play a role in these expert decisions? Assuming the local authorities and the state will want to give insight in the way they achieve their goals, this can be a potential bottleneck.

The potential lack of discretionary powers with the duty to provide youth care when a request for care has been received seems to contrast with the powers authorities have when developing their policy plan, in which they design the access to care. There are a few conditions within the Act, such as safeguarding sufficient knowledge. Yet, it seems there is more freedom of manoeuvre within this step in the procedure. Further research will have to show if and how local authorities use this freedom.

The state has clear goals for youth care, but does not provide the care itself. At the same time the rules that need to guide the local authorities to provide the care are vague, so discretionary powers are granted to local authorities to apply these rules. When the state wants to assure its goals are met, it seems that the state needs to either have great trust in these authorities, or needs to hold them accountable. For the latter, a control system will need to be put in place, that is clear to all parties involved. However, in this case it seems that both conditions, trust or a transparent and clear control system, are not present.

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